

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

COUNTRY STEVENS,

Plaintiff,

vs.

HOWARD SKOLNIK, et al.,

Defendants.

3:09-cv-00227-RCJ (WGC)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Robert C. Jones, Chief United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before the court is Defendants' Motion to Dismiss. (Doc. #104.)<sup>1</sup> Plaintiff has opposed (Doc. #110)<sup>2</sup>, and Defendants have replied (Doc. # 113). Also before the court is Plaintiff's Motion for Summary Judgment. (Doc. # 111.)<sup>3</sup> After a thorough review, the court recommends that Defendants' motion (Doc. # 104) be granted in part and denied in part, as set forth herein. It is further recommended that Plaintiff's motion (Doc. # 111) be denied.

**I. BACKGROUND**

Plaintiff Country Stevens (Plaintiff), a *pro se* litigant in custody of the Nevada

---

<sup>1</sup> Refers to court's docket number. Pursuant to the court's order (Doc. # 121), Defendants' filed a supplement to their motion (Doc. # 122).

<sup>2</sup> Plaintiff titles his response, "Opposition to Defendants' Motion to Dismiss and Motion for Summary Judgment," and the Clerk filed this document as Plaintiff's Opposition to Defendants' Motion to Dismiss (Doc. # 110) and Plaintiff's Motion for Summary Judgment (Doc. # 111). The documents are identical.

<sup>3</sup> While the court previously stayed briefing on Plaintiff's Motion for Summary Judgment (*see* Doc. # 119), upon further review of Plaintiff's motion the court has determined Plaintiff has not met his burden, and recommends denial of the motion.

1 Department of Corrections (NDOC), brings this action pursuant to 42 U.S.C. § 1983, 42 U.S.C.  
 2 § 2000cc, *et. seq.*, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and  
 3 the Nevada Constitution based on the confiscation of his religious materials and interference  
 4 with his ability to practice his religious beliefs. (Pl.'s Compl. (Doc. # 8) at 5, 24, 32.)<sup>4</sup> At all  
 5 relevant times, Plaintiff has been housed at either Lovelock Correctional Center (LCC) or  
 6 Northern Nevada Correctional Center (NNCC). (*Id.* at 1.) Defendants are Howard Skolnik,  
 7 Donald Helling, Jim Benedetti, Tony Corda, Senior Correctional Officer Bauman, Lieutenant  
 8 Olivas, Sergeant Lewis, and Senior Correctional Officer Hicks. (*Id.* at 2-4.) Plaintiff seeks  
 9 declaratory relief, injunctive relief, compensatory damages, and punitive damages. (*Id.* at 35-  
 10 37.)

11 The factual bases for Plaintiff's remaining claims are as follows: (1) participation in  
 12 Native American ceremonies (Doc. # 8 at 6); (2) possession of items of religious property (*id.*  
 13 at 6-7, 10-11, 13-15, 26); (3) prayer (*id.* at 7, 14, 25); (4) racial and religious discrimination (*id.*  
 14 at 7, 15, 24, 32); (5) preparation and adequacy of ceremonial meals (*id.* at 10-11, 13-14);  
 15 (6) wearing religious headgear (*id.* at 10); (7) burning herbs in an individual setting (*id.* at 11,  
 16 13); (8) use of religious grounds (*id.* at 12, 20); (9) ability to order religious books, papers, and  
 17 music (*id.* at 14); and (10) the conduct of Senior Correctional Officer James Bauman (*id.* at  
 18 5, 24, 32).

19 Defendants now move to dismiss Plaintiff's Complaint for failure to exhaust available  
 20 administrative remedies. (Doc. # 104.) Plaintiff opposed (Doc. # 110) and also moved for  
 21 summary judgment (Doc. # 111).

## 22 **II. LEGAL STANDARD-UNENUMERATED 12(b) MOTION TO DISMISS**

23 The PLRA provides that "[n]o action shall be brought with respect to prison  
 24 conditions under section 1983 of this title, or any other Federal law, by a prisoner confined  
 25

---

26 <sup>4</sup> Plaintiff's claim that Defendants violated 28 U.S.C. § 994 was dismissed with prejudice. (*See* Doc. # 60  
 27 and Doc. # 71.) In addition, the court found Plaintiff's claims arising prior to April 29, 2007, are barred under the  
 28 applicable two-year statute of limitations. (*Id.*)

1 in any jail, prison, or other correctional facility until such administrative remedies as are  
2 available are exhausted.” 42 U.S.C. § 1997e(a). An inmate must exhaust his administrative  
3 remedies irrespective of the forms of relief sought and offered through administrative  
4 avenues. *Booth v. Churner*, 532 U.S. 731, 741 (2001). The Supreme Court recently clarified  
5 that exhaustion cannot be satisfied by filing an untimely or otherwise procedurally infirm  
6 grievance, but rather, the PLRA requires “proper exhaustion.” *Woodford v. Ngo*, 548 U.S.  
7 81, 89 (2006). “Proper exhaustion” refers to “using all steps the agency holds out, and doing  
8 so *properly* (so that the agency addresses the issues on the merits).” *Id.* (quoting *Pozo v.*  
9 *McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

10 This court has interpreted Justice Alito’s majority opinion in *Woodford* as setting  
11 forth two tests for “proper exhaustion”: (1) the “merits test,” satisfied when a plaintiff’s  
12 grievance is fully addressed on the merits by the administrative agency and appealed  
13 through all the agency’s levels, and (2) the “compliance test,” satisfied when a plaintiff  
14 complies with all critical procedural rules and deadlines. *Jones v. Stewart*, 457 F. Supp. 2d  
15 1131, 1134 (D. Nev. 2006). “A finding that a plaintiff has met either test is sufficient for a  
16 finding of ‘proper exhaustion’. Defendants must show that Plaintiff failed to meet both the  
17 merits and compliance tests to succeed in a motion to dismiss for failure to exhaust  
18 administrative remedies.” *Id.*

19 The failure to exhaust administrative remedies is treated as a matter in abatement  
20 and is properly raised in an unenumerated Rule 12(b) motion. *Wyatt v. Terhune*, 315 F.3d  
21 1108, 1119 (9th Cir.2003). Failure to exhaust administrative remedies is an affirmative  
22 defense, and defendants bear the burden of raising and proving failure to exhaust. *Id.* A  
23 court, in deciding a motion to dismiss based on exhaustion, may look beyond the pleadings  
24 and decide disputed issues of fact without converting the motion into one for summary  
25 judgment. *Id.* (citing *Ritza v. Int’l Longshoremen’s & Warehousemen’s Union*, 837 F.2d  
26 365, 368 (9th Cir. 1988) (per curiam)). If a court concludes that the prisoner bringing a suit  
27 has failed to exhaust nonjudicial remedies, “the proper remedy is dismissal of the claim  
28

without prejudice.” *Id.* at 1120.

During the time period in question, for prisoners within the NDOC system, exhaustion of administrative remedies required compliance with the inmate grievance procedure set forth in NDOC Administrative Regulation (AR) 740.<sup>5</sup> (Doc. # 104-2 (Ex. A) at ¶ 7; Doc. # 104-2 (Ex. B) at 5.) The administrative process consisted of: (1) an informal level grievance; (2) a first level formal written grievance appealing the informal grievance decision; and (3) a second level grievance appealing the first level grievance decision. (Doc. # 104-2 (Ex. B) at 14.)<sup>6</sup> AR 740 further provides that all documentation and factual allegations available to the inmate are to be submitted at the informal level. (Doc. # 104-2 (Ex. B) at 18.)

In addition to using the grievance system, Plaintiff was required to comply with the procedures set forth in AR 810 and the NDOC Religious Practice Manual in connection with a request to add religious property or to request new or additional religious accommodations. (Doc. # 104 at 5, Doc. # 104-3 (Ex. C) at 2-4, 15-20.)

### **III. DISCUSSION-UNENUMERATED 12(b) MOTION TO DISMISS**

#### **A. Evidentiary Issues**

In support of their motion, Defendants initially filed reports from NDOC’s electronic record keeping system, the Nevada Offender Tracking and Information System (NOTIS), consisting of a log and *summary* of all grievances filed by Plaintiff from February 13, 2007 through March 14, 2011. (See Doc. 104-3 (Ex. D) at 52-54; Doc. # 104-4 (Ex. E) at 2-35.) The only actual grievance documents Defendants filed are those related to grievance numbers 2006-27-11753 and 2006-27-86530 (see Doc. # 104-4 (Ex. E) at 2-35; Doc. # 140-4 (Ex. F) at 37-47; Doc. # 104-5 (Ex. G) at 2-45), and those were not properly authenticated.

---

<sup>5</sup> AR 740 has since been revised. The version of AR 740 relied upon by Defendants was effective January 5, 2004 through November 23, 2009. (Doc. # 104-1 (Ex. A) at ¶ 7; Doc. # 104-1 (Ex. B).)

<sup>6</sup> Unless otherwise specified, all references to page numbers in the record refer to the court docket page numbers.

1 On November 8, 2011, the court ordered that Defendants file a supplement to their  
2 motion on or before November 15, 2011, to include the following: (1) properly authenticated  
3 documentary evidence related to grievance numbers 2006-27-11753 and 2006-27-86540; and  
4 (2) properly authenticated grievance documents, for each level of review, along with all prison  
5 responses, for every other grievance relied upon in support of Defendants' Motion to Dismiss.  
6 (*See* Doc. # 21.)

7 In compliance with the court's order, Defendants submitted evidence supplementing  
8 their motion, consisting of hundreds of pages of documents. (Doc. # 122.) To the extent that  
9 the court's November 8, 2011 order may have created some confusion, the court takes this  
10 opportunity to further clarify and explain its concern with the Defendants' filing only the  
11 NOTIS report, and not the actual grievance documentation, in an attempt to circumvent the  
12 filing of thousands of pages of documentation in the future. As counsel for Defendants is aware,  
13 the court has recently raised various evidentiary issues with respect to the filing of an  
14 unenumerated 12(b) motion to dismiss, which include apparent discrepancies between the  
15 grievance summaries in the NOTIS report and the information contained within the actual  
16 grievance filed by the inmate, and the failure to authenticate evidence filed in support of these  
17 motions.

18 While the NOTIS summary of grievances is helpful, and the court does not discourage  
19 Defendants from filing these reports, the summary should only serve to supplement the actual  
20 documents that form the basis of the affirmative defense. Therefore, if a defendant is referring  
21 to a specific grievance or grievances to support an unenumerated 12(b) motion, the relevant  
22 grievance documentation, and not simply the NOTIS report, should be filed in support of the  
23 motion. If, on the other hand, the defendants are claiming that *none* of the thousands of pages  
24 of documents contained within the inmate's grievance file make reference to the claims the  
25 inmate is asserting in the lawsuit, the defendant need not provide the court with every single  
26 document in the inmate's grievance file, as has been done in this instance. Instead, it is  
27 sufficient for the defendant to provide a declaration, under penalty of perjury, by a person who  
28

1 has reviewed the actual *grievance file* for the relevant time period (and not simply the NOTIS  
2 report), certifying that the grievance documentation reviewed makes no reference to the  
3 constitutional claim at issue.

4 In this case, for example, Defendants should have initially provided the *authenticated*  
5 grievance documentation for the grievances that are actually at issue, numbers 2006-27-11753  
6 and 2006-27-86540. In addition, because Defendants claim that none of the other grievances  
7 filed by Plaintiff during the relevant time period relate to the constitutional claim at issue, it  
8 would have been sufficient for Defendants to present a declaration as described above. Instead,  
9 as noted above, Defendants filed a voluminous binder of all of Plaintiff's grievances. (Doc. #  
10 122.) This required the court to undertake a time consuming, page-by-page review of hundreds  
11 of pages of grievances. The court wishes to avoid repetition of this scenario in the future by  
12 requesting the Office of the Attorney General to adopt the "grievance review" procedures the  
13 court has proposed.

14 Finally, if there is any confusion with respect to this issue in this case, or any other case,  
15 counsel is encouraged to file a brief motion requesting a telephonic status conference, and the  
16 court will do its best to accommodate the parties in an expeditious fashion.

17 With proper evidence before it, the court will now address the merits of Defendants'  
18 motion.

## 19 **B. Analysis**

### 20 **1. Defendants did not waive their right to raise the exhaustion defense**

21 Plaintiff argues Defendants waived their right to raise the exhaustion defense. (*See* Doc.  
22 # 110 at 2.) The court finds this argument has no merit.

23 The failure to exhaust administrative remedies is properly treated as a matter in  
24 abatement raised in an unenumerated 12(b) motion. *Wyatt v. Terhune*, 315 F.3d 1108, 1119  
25 (9th Cir. 2003). It is an affirmative defense that Defendants bear the burden of raising and  
26 proving, *id.*, and Defendants are correct that the PLRA does not contain a temporal  
27 requirement for raising the defense. Defendants preserved the defense by raising it in their  
28

1 Answer. (Doc. # 73 at 19.)

## 2 **2. Grievances at Issue**

3 Plaintiff filed twenty (20) grievances at the informal level since February 13, 2007.  
 4 (Doc. # 104 at 6; Doc. 104-3 (Ex. D) at 52-54; Doc. # 104-4 (Ex. E) at 2-35.)<sup>7</sup> For twelve (12)  
 5 of these, he completed the grievance process through the second level, as required under AR  
 6 740. (Doc. # 104 at 6; Doc. # 104-4 (Ex. E) at 4, 5, 7, 9, 11, 13, 15, 20, 24, 28, 33, 35; Doc. # 122  
 7 Attachments 1-4.)<sup>8</sup> Of these twelve (12), five (5) were not completed at the second level until  
 8 *after* the filing of Plaintiff's Complaint. (Doc. # 104 at 7; Doc. # 104-3 (Ex. E) at 4, 5, 7, 9, 11;  
 9 Doc. # 122-2, Doc. # 122-3, Doc. # 122-4, Doc. # 122-5, Doc. # 122-6, Doc. # 122-7, Doc. # 122-  
 10 8 (Attachment 3).)<sup>9</sup>

11 Defendants are correct that the PLRA requires exhaustion *prior* to the initiation of the  
 12 lawsuit. *See McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002) (per curiam)  
 13 (exhaustion requirement does not permit prisoner to file complaint addressing non-exhausted  
 14 claims even if he exhausts while case is pending); *see also Vaden v. Summerhill*, 449 F.3d  
 15 1047, 1050-51 (9th Cir. 2006) ("The bottom line is that a prisoner must pursue the prison  
 16 administrative process as the first and primary forum for redress of grievances. He may initiate  
 17 litigation in federal court only after the administrative process ends and leaves his grievances  
 18 unredressed. It would be inconsistent with the objectives of the statute to let him submit his  
 19 complaint any earlier than that."). Allowing Plaintiff to proceed with claims without having  
 20

---

21 <sup>7</sup> As explained by Defendants, the grievances currently relevant to this lawsuit are those dating back to  
 22 February 13, 2007. (Doc. # 104 at n. 4.) The court dismissed all claims arising prior to April 29, 2007, as barred  
 23 by the statute of limitations, and AR 740 provides that the total time allowed from initial submission of an  
 24 informal level grievance to the last level of procedural review should not exceed seventy-five (75) days. The statute  
 of limitations is stayed while grievances are pending, and therefore, the start date of the time period during which  
 Plaintiff could have filed grievances on issues not barred by the statute of limitations is February 13, 2007.

25 <sup>8</sup> Grievance numbers 2006-29-02914, 2006-29-01260, 2006-29-01254, 2006-28-95156, 2006-28-93700,  
 26 2006-28-82835, 2006-28-81214, 2006-27-86530, 2006-27-11753, 2006-27-10588, 2006-26-51232, and 2006-26-  
 23487.

27 <sup>9</sup> Grievance numbers 2006-29-02914, 2006-29-01260, 2006-29-01254, 2006-28-95156, and 2006-28-  
 28 93700.



1 exhausted prior to filing his Complaint would create an end-run around the PLRA, *McKinney*  
 2 and *Vaden*. Therefore, the claims contained in grievances responded to at the second level after  
 3 April 29, 2007 (grievance numbers 2006-29-02914, 2006-29-01260, 2006-29-01254, 2006-  
 4 28-95156, and 2006-28-93700), were not properly exhausted.

5 Defendants claim that of the remaining seven (7) grievances<sup>10</sup>, only two (2) address the  
 6 religious rights issues of which Plaintiff complains in his lawsuit: grievance numbers 2006-27-  
 7 11753 and 2006-27-86530. (Doc. # 104 at 7; Doc. 104-3 (Ex. D) at 52-54; Doc. # 104-4 (Ex.  
 8 E) at 2-35; Doc. # 122-2-Doc.# 122-9 (Attachments 3-4).) A review of the grievance  
 9 documentation provided with respect to these other grievance numbers confirms Defendants'  
 10 contention: 2006-28-82835 (issues with the toilet), 2006-28-81214 (claim of discrimination  
 11 against those in wheelchairs), 2006-27-10588 (delay in getting medications), 2006-26-51232  
 12 (denial of medical treatment), and 2006-26-23487 (unauthorized typewriter). (Doc. # 122-2-  
 13 Doc.# 122-9 (Attachments 3-4).) These grievances are unrelated to the allegations of Plaintiff's  
 14 action.

15 The court will now determine whether Plaintiff has exhausted his administrative  
 16 remedies with respect to the two grievances which raise religious rights issues; grievance  
 17 numbers 2006-27-11753 and 2006-27-86530.

### 18 **3. Grievance number 2006-27-11753**

#### 19 **a. Informal level**

20 Plaintiff filed an informal level grievance on April 15, 2008, stating that his religious  
 21 rights were violated when he requested approval from Correctional Officer Hicks to purchase  
 22 religious items, as well as approval for hobby craft and received no response. (Doc. # 122-1 at  
 23 6-8.) He further claims that he spoke with caseworker Paul Hocksprung on April 14, 2008, and  
 24 asked him to contact Mr. Hicks, so that he could file a grievance, to no avail. (*Id.*) The informal  
 25 level grievance was denied on May 14, 2008. (*Id.* at 5.)

---

26  
 27 <sup>10</sup> Grievance numbers 2006-28-82835, 2006-28-81214, 2006-27-86530, 2006-27-11753, 2006-27-10588,  
 28 2006-26-51232, and 2006-26-23487.



**b. First level**

Plaintiff filed a first level grievance on June, 3, 2008, stating that he disagrees with the response to his informal level grievance and the continued denial of his rights under the First and Fourteenth Amendments. (Doc. # 122-1 at 10-11.) The prison responded on July 11, 2008, attaching a copy of AR 810, instructing Plaintiff to refer to the requirements for participating in Native American activities. (*Id.* at 9.)<sup>11</sup>

**c. Second level**

Plaintiff filed his second level grievance on July 30, 2008, stating that AR 810 violates his First and Fourteenth Amendment rights, as well as RLUIPA. (Doc. # 122-1 at 13-15.) He goes on to state that he has the right to individually practice his religion, and the right to spiritual items. (*Id.*) The grievance was denied on August 6, 2008. (*Id.* at 12.)

**4. Grievance number 2006-27-86530**

**a. Informal level**

Plaintiff filed a twenty-seven (27) page informal level grievance on October 1, 2008. (Doc. # 122-1 at 21-51.) Plaintiff asserted that he was placed in administrative segregation on August 19, 2008, and NDOC Senior Correctional Officer Alexander and Correctional Officer Estes inventoried his property. He alleges that when his property was returned on August 21, 2008, he discovered items were broken and missing. (*Id.*) Plaintiff further stated that the property inventory list was falsified, and that Sergeant Lewis helped Alexander and Estates cover up their conduct. (*Id.*) Plaintiff claimed their conduct was motivated by their prejudice against Plaintiff's religion. (*Id.*)

The prison denied the informal level grievance, stating that Plaintiff failed to note any discrepancies when he received his property inventory list. (Doc. # 122-1 at 20.)

**b. First level**

Plaintiff filed his first level grievance on November 10, 2008, disagreeing with the

---

<sup>11</sup> The requirements of AR 810 and the Religious Practice Manual are set forth herein. *See, infra*, at 10.

1 informal level response. (Doc. # 122-1 at 53-58.) Plaintiff asserted that the response was  
2 inadequate because he noted the discrepancies in the inventory list to correctional staff. (*Id.*)

3 The prison upheld the informal level response. (Doc. # 122-1 at 52.)

4 **c. Second level**

5 Plaintiff submitted his second level grievance on December 5, 2008. (Doc. # 122-1 at 60-  
6 63.) Plaintiff stated that Jim Benedetti's response was unacceptable, and that Don Helling  
7 failed to act upon the religious issues Plaintiff previously grieved. (*Id.*)

8 The determination was again upheld, and Plaintiff's grievance denied on January 12,  
9 2009. (Doc. # 122-1 at 59.)

10 **5. Applicability of AR 810**

11 First, Plaintiff argues that the NDOC Request for Accommodation of Religious Practices  
12 form either did not exist or was not used until October 2009, and the PLRA does not require  
13 exhaustion of remedies that do not exist. (Doc. # 110 at 2.)

14 The PLRA requires that an inmate exhaust "such administrative remedies as are  
15 available[.]" 42 U.S.C. § 1997e(a). Courts have interpreted this to require "proper exhaustion,"  
16 *see Woodford*, 548 U.S. at 93, which means "using all steps the agency holds out, and doing so  
17 *properly* (so that the agency addresses the issues on the merits)." *Id.* (citations omitted).

18 AR 810, effective July 8, 2008, governs religious faith group activities and programs  
19 within NDOC. (Doc. # 104-3 (Ex. C) at 2.) AR 810.02.2 provides that religious activities are  
20 established in the NDOC Religious Practice Manual. (*Id.* at 3.) Section 10 of the Religious  
21 Practice Manual governs inmate requests related to the practice of religion, which fall into five  
22 (5) categories: (1) requests for recognition of a new religion; (2) requests for new religious  
23 property; (3) requests for new or additional services; (4) requests for special holiday service;  
24 or (5) requests for food at chapel and/or earth-based religious celebrations. (*Id.* at 15.)

25 When an inmate seeks new religious property, the inmate must make a written request  
26 to the chaplain, and the chaplain will meet with the inmate and, when deemed necessary, will  
27 provide the inmate with a Request for Accommodation of Religious Practice Form, which must

1 then be returned to the chaplain. (Doc. # 104-3 at 16.) The request is reviewed by the Religious  
2 Review Team (RRT) (consisting of the warden, chaplain, and deputy attorney general). (*Id.*  
3 at 16-17.) In the event the request is denied, the inmate must be notified in writing of the  
4 decision and reason for denial, and a copy of the denial is maintained in the inmate's  
5 Institutional File (I-file) which is maintained by the prison. (*Id.* at 17.)

6 To request a new or additional religious service, the inmate must make a written request  
7 for consideration by the chaplain. (Doc. # 104-3 at 17-18.)

8 AR 810 became effective *July 8, 2008*, and Plaintiff filed his complaint on *April 29,*  
9 *2009*. (See Doc. # 104-3, Doc. # 1.) Plaintiff's contention that the NDOC Request for  
10 Accommodation of Religious Practices form either did not exist or was not used until October  
11 2009 (Doc. # 110 at 2) is belied by the fact that the form is attached to the regulation which  
12 became effective July 8, 2008, and Plaintiff was advised to utilize the form in response to his  
13 grievances. (See Doc. # 113 at 4, Doc. # 104-3 at 2, 31, 46.) Therefore, the court finds Plaintiff  
14 was required to comply with AR 810 prior to filing his Complaint with respect to requests for  
15 religious property or requests for new or additional religious services.

16 Next, Plaintiff argues that he was trying to have his religious needs met through Chaplin  
17 "Jane" in 2008, but she retired and was not replaced until July 2009. (Doc. # 110 at 2.) This  
18 does not explain his failure to comply with the procedures outlined in AR 810. The NDOC  
19 Religious Practice Manual requires any request for new religious property or for a new or  
20 additional religious service be made *in writing* via inmate correspondence to the chaplain.  
21 (Doc. # 104-3 at 16-17.)

22 Defendants filed the declaration of NNCC Chaplain W. Gregory Hummel, who reviewed  
23 the file designated for storing Request for Accommodation of Religious Practices Forms  
24 submitted by inmates, and found no submissions by Plaintiff. (Doc. # 104-5 at 61-62 (Ex. L).)  
25 Defendants also filed the declaration of Melanie McBroom (Doc. # 104-5 at 47-48 (Ex. H)),  
26 who reviewed Plaintiff's I-file, and located one (1) NDOC Religious Property Request Form  
27 dated August 26, 2008, but it did not contain a Request for Accommodation of Religious  
28

1 Practices Form. (Doc. # 104-5 at 47-48, Doc. # 104-5 at 50-51 (Ex. I).)

2 The court will now address Plaintiff's compliance with AR 810 and whether he properly  
3 completed the grievance process with respect to his particular claims.

#### 4 **6. Exhaustion of Particular Claims**

##### 5 **a. Participation in Native American ceremonies**

6 Plaintiff claims that he is precluded from participating in numerous Native American  
7 ceremonies, including the following: pipe; sweat lodge; smudge; midwinter; dead feast;  
8 tobacco; maple tree; thunder dance; medicine mask; seed planting; strawberry; raspberry;  
9 beans; green corn; harvest; and end of season ceremonies. (Doc. # 8 at 6.)

10 The declarations of Chaplain Hummel and Ms. McBroom demonstrate that Plaintiff  
11 failed to comply with AR 810 and the Religious Practices Manual prior to filing his Complaint  
12 with respect to this claim. (*See* Doc. # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).)

13 In addition, Defendants are correct that Plaintiff failed to grieve this issue. While  
14 Plaintiff uses the word "ceremony" in the first page of his informal level grievance for grievance  
15 number 2006-27-11753, he makes no mention of being denied the ability to participate in  
16 Native American ceremonies. (Doc. # 122-1 at 6-8.) The gravamen of that grievance is the  
17 denial of Plaintiff's request for religious property and hobby craft, and his ability to grieve this  
18 issue. (*Id.*) Likewise, grievance number 2006-27-86530 focuses on the confiscation of  
19 Plaintiff's religious items, and not on Native American "ceremonies." (Doc. # 122-1 at 21-63.)

20 At a minimum, an inmate's grievance must put the prison on notice of the problem. *See*  
21 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009).

22 A grievance need not contain legal terminology or legal theories unless they are  
23 in some way needed to provide notice of the harm being grieved. A grievance  
24 also need not contain every fact necessary to prove each element of an eventual  
legal claim. The primary purpose is to alert the prison to a problem and facilitate  
its resolution, not to lay groundwork for litigation.

25 *Id.* Neither of these grievances provided NDOC with notice that Plaintiff was being deprived  
26 of participating in various Native American "ceremonies." Coupled with his failure to utilize the  
27 procedures set forth in AR 810 and the Religious Practices Manual, the court finds Plaintiff

1 failed to exhaust his administrative remedies with respect to this claim, and it should be  
2 dismissed without prejudice.

3 **b. Possession of religious property items**

4 **i. Allegations**

5 Plaintiff claims that he must possess certain religious items, including: spiritual  
6 packages; prayer blanket; sacred totems; sacred herbs; sacred teachings; sacred music; sacred  
7 pipe; sacred prayer stick or medicine staff; sacred drum; sacred flute; sacred rattles; ceremonial  
8 hat; sacred headband; medicine bag; chokers; necklaces; claws; stones; crystals; feathers; arm  
9 bands; abalone shell (smudge bowl); sacred shields; hides; sinew; needles; seed beads; beading  
10 thread; scissors; furs; beads; laces; sacred herb bags; possibles bag; drum stick; and beading  
11 needles. (Doc. # 8 at 6-7, 10-11, 13-15.)

12 **ii. Grievances**

13 In his informal level grievance for grievance number 2006-27-86530, Plaintiff asserts  
14 that the following religious items were wrongfully confiscated and not returned: his prayer  
15 stick; a smudge bowl (small abalone shell); an herb dish; boxes of seed beads; a bag of golden  
16 elk and deer hide; four (4) needles, beading and gloves; six (6) small jars of powder paints; six  
17 (6) small jars of crow beads; one (1) large spool of black thread; a miniature sacred pipe stem  
18 and regalia with beaded designs; one (1) ceremonial arm band made of blue, white, and green  
19 seed beads with leather straps; a ceremonial arm band made of red, blue, black, and white  
20 colored seed beads; a roseetee of a native star design made of seed beads; a strap with the word  
21 "Native" made of seed beads; a reddish-brown feather with the end wrapped in deer hide; a  
22 drawing board with native book cover; native family tree wolf claw; native religious designs  
23 on beadgraph paper and colored pencils; a small bottle of glue; a red and black native head  
24 band; a small circle of jean material; two (2) tan envelopes; one (1) native hair tie made from  
25 horn and crow beads and golden elk. (Doc. # 122-1 at 21-51.)

26 Defendants argue that this grievance is unrelated to Plaintiff's allegations that prison  
27 regulations prevent him from possessing necessary religious property. (Doc. # 104 at 13.) The  
28

1 court disagrees, and finds this is belied by the record. The court finds that this informal level  
2 grievance provides Defendants with detailed notice of the problem, *i.e.*, the claimed inability  
3 of Plaintiff to possess certain religious property. (Doc. # 122-1 at 21-51.) While Defendants are  
4 correct that this grievance relates to a specific incident taking place in August of 2008, it is  
5 clear that Plaintiff takes issue with the fact that these items are unauthorized and he is not  
6 allowed to possess them as religious property. Accordingly, the court finds Plaintiff sufficiently  
7 complied with NDOC's grievance process with respect to this claim.

8 **iii. AR 810**

9 Next, Defendants argue this claim should be dismissed because Plaintiff failed to fill out  
10 a Request for Accommodation of Religious Practices Form. (Doc. # 104 at 12.)

11 Defendants have filed a NDOC Religious Property Request Form, dated August 26,  
12 2008, submitted by Plaintiff to the chaplain. (Doc. # 104-5 at 50-51 (Ex. I).) The form appears  
13 to request the following items: possibles bag; pipe bag; pipe bowl bag; large sage bag; matches  
14 bag; small sage bag; tobacco bag; sweet grass bag; feather bag; pipe; pipe stem; pipe stem  
15 cleaner wood; pipe bowl cleaner wood; necklace; spiritual choker; peace shield; shield; rattle;  
16 prayer feather; bowl with lid, gourd; spiritual box; altar; spiritual box; herbs; bead box; head  
17 band; totem wood; feathers, crow beads, seed beads, colored glass beads, pony beads, hair pipe,  
18 silver beads, turquoise beads; hides white and gold; nymo and wax thread; finding silver and  
19 stone; paints and brushes; tobacco mixtures; rosettes, beaded; glue; scissors; beading needles,  
20 gloves needles, sewing needles; lighter case; beaded spiritual bag; drum handle; tribe of  
21 nations shield; mint on string; rocks; small piece of wood; small bone buffalo skull; small herb  
22 bag; wing fan; small shield; and herbs (chamomile, cinnamon, mint, lavender). (*Id.*)

23 The chaplain's response states that Plaintiff is not permitted to have his items brought  
24 back by his attorney, but may request to order new items in accordance with AR 810 and the  
25 Religious Practices Manual. (*Id.*)

26 The court is troubled by Defendants' argument. Defendants contend that Plaintiff failed  
27 to exhaust his administrative remedies because he did not submit a Request for  
28

1 Accommodation of Religious Practices Form concerning his religious property (Doc. # 104 at  
2 12), but the provision in the NDOC Religious Practices Manual governing requests for religious  
3 property states that a request is to be made in writing to the chaplain (Doc. # 104-3 at 16),  
4 which it appears Plaintiff accomplished by submitting this form. (Doc. # 104-5 at 50-51  
5 (Ex. I).) Once a request has been submitted, the manual states that the chaplain will meet with  
6 the inmate, and *when deemed necessary*, will provide the inmate with a Request for  
7 Accommodation of Religious Practice Form. (*Id.*)

8 Defendants do not address whether the chaplain met with Plaintiff pursuant to the  
9 policy outlined in the Religious Practice Manual. Nor do they address whether the chaplain  
10 provided Plaintiff with the form in response to his request for religious property. Therefore,  
11 from the record before the court, it appears Plaintiff complied with all policies held out to him.  
12 As a result, the court finds Defendants have not met their burden of establishing Plaintiff failed  
13 to exhaust his administrative remedies with respect to this claim, and the motion to dismiss  
14 should be denied in this regard.

### 15 **c. Prayer**

16 Plaintiff claims that his ability to pray has been inhibited. (Doc. # 8 at 7, 14, 25.)

17 To the extent this claim can be construed as a request for new or additional religious  
18 services, the declarations of Chaplain Hummel and Ms. McBroom demonstrate that Plaintiff  
19 failed to comply with AR 810 and the Religious Practices Manual prior to filing his Complaint.  
20 (*See* Doc. # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).) Moreover, neither grievance number 2006-  
21 27-11753 nor grievance number 2006-27-86530 (Doc. # 122-1) put Defendants on notice that  
22 Plaintiff was claiming his ability to pray was being infringed. *See Griffin*, 557 F.3d at 1120  
23 (“primary purpose [of the grievance] is to alert the prison to a problem and facilitation its  
24 resolution[.]”). Therefore, this claim should be dismissed without prejudice.

### 25 **d. Discrimination**

26 Plaintiff asserts he was subject to religious discrimination. (Doc. # 8 at 7.) Plaintiff  
27 alleges that Defendants will not allow Plaintiff to wear his sacred headband, but they allow  
28



1 other inmates exercising their religious beliefs, including Muslim and Jewish inmates, to wear  
2 and possess religious headgear. (*Id.* at 15.) Plaintiff further alleges that Lieutenant Olivas and  
3 Senior Correctional Officer Bauman discriminated against him because of his religion when  
4 they destroyed his religious property. (*Id.* at 24.) On screening, the court determined that  
5 Plaintiff set forth a colorable claim for violation of the Equal Protection Clause of the  
6 Fourteenth Amendment, based on the alleged confiscation and desecration of Plaintiff's  
7 religious items. (Doc. # 7 at 6.)

8 First, the NDOC Religious Practice Manual does not contain a provision governing a  
9 claim that an inmate is being subject to religious discrimination. (*See* Doc. # 104-3 at 15.)  
10 Therefore, Plaintiff was not required to submit any written request pursuant to AR 810 or the  
11 Religious Practice Manual prior to filing his Complaint with respect to this claim.

12 Second, the court finds that Plaintiff sufficiently put Defendants on notice of his  
13 religious discrimination claim in grievance number 2006-27-86530. (Doc. # 122-1 at 21-63.)  
14 In his informal level grievance, after describing the confiscation and inventorying of his  
15 property, Plaintiff states, "I felt as though I had been attacked from the standpoint of being  
16 Mohawk and for my religious beliefs..." (*Id.* at 23; *see also id.* at 26-28, 33-34, 39, 42.)

17 Thus, the court finds Plaintiff properly exhausted his administrative remedies with  
18 respect to this claim and Defendants' motion should be denied in this regard.

19 **e. Preparation and adequacy of food for ceremonial meals**

20 Plaintiff alleges that AR 810.01.1.3.1 improperly limits religious dietary customs to those  
21 items prepared and/or served in the culinary, or those that can be purchased from the canteen,  
22 and that his religious practices require him to prepare his sacred meal himself. (Doc. # 8 at 10.)

23 The declarations of Chaplain Hummel and Ms. McBroom demonstrate that Plaintiff  
24 failed to comply with AR 810 with respect to this claim prior to filing his Complaint. (*See* Doc.  
25 # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).) Moreover, neither grievance number 2006-27-11753  
26 nor grievance number 2006-27-86530 put Defendants on notice of a claim about the adequacy  
27 of food and ability to prepare sacred meals. (*See* Doc. # 122-1.) Having failed to comply with  
28

1 AR 810, the Religious Practice Manual, and AR 740, Plaintiff's claims related to the preparation  
2 and adequacy of food for ceremonial meals should be dismissed without prejudice.

3 **f. Wearing religious headgear**

4 Plaintiff asserts that AR 810.01.1.3.3 prohibits any headgear to be worn by inmates in  
5 the culinary, on the yard, or in living units, but Plaintiff's religious customs require him to wear  
6 a ceremonial hat or headband. (Doc. # 8 at 10.)

7 To the extent Plaintiff claims he was denied religious property in the form of religious  
8 headgear, this claim is addressed above. However, to the extent Plaintiff claims a denial of the  
9 ability to wear his religious headgear in the culinary, yard or living units, the court finds  
10 Plaintiff failed to exhaust available administrative remedies.

11 First, to the extent this can be construed as a request for new or additional religious  
12 services, the declarations of Chaplain Hummel and Ms. McBroom demonstrate that Plaintiff  
13 failed to comply with AR 810 with respect to this claim prior to filing his Complaint. (*See* Doc.  
14 # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).) Second, neither grievance number 2006-27-11753 nor  
15 grievance number 2006-2786530 puts Defendants on notice of Plaintiff's alleged inability to  
16 wear his religious headgear in the culinary, yard, or living units. Accordingly, this claim should  
17 be dismissed without prejudice.

18 **g. Burning herbs in an individual setting**

19 Plaintiff claims that R 810.05.1.2.4 allows inmates whose religious expression includes  
20 smoke producing substances to burn small amounts of these substances during group worship  
21 services only, but it does not authorize the use of these substances by individuals in their cells  
22 or other parts of the facility. (Doc. # 8 at 11.) Plaintiff further alleges that Defendants will not  
23 allow him to burn small amounts of sage, sweet grass or cedar in his living area or other areas  
24 in the facility, while Native American inmates practicing in a group setting may do so. (*Id.* at  
25 13.)

26 Once again, to the extent this can be construed as a request for new or additional  
27 religious services, the declarations of Chaplain Hummel and Ms. McBroom demonstrate that  
28

1 Plaintiff failed to comply with AR 810 and the Religious Practice Manual with respect to this  
2 claim prior to filing his Complaint. (*See* Doc. # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).)  
3 Likewise, neither of the grievances at issue, numbers 2006-27-11753 and 2006-27-86530 (Doc.  
4 # 122-1), put Defendants on notice of this claim. Accordingly, the court recommends dismissing  
5 this claim without prejudice.

#### 6 **h. Use of religious grounds**

7 Plaintiff claims that the use of religious land is subject to Defendants' arbitrary schedule,  
8 and he is precluded from using a separate plot of ground for solitary practice of his religion.  
9 (Doc. # 8 at 12, 20.)

10 Plaintiff failed to comply with AR 810 and the Religious Practice Manual prior to filing  
11 his Complaint with respect to this claim. (*See* Doc. # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L).)  
12 Once again, Plaintiff failed to put Defendants on notice of this claim in either of the grievances  
13 at issue. (*See* Doc. # 122-1.) Accordingly, these claims should be dismissed without prejudice.

#### 14 **i. Ability to order religious books, papers, and music**

15 Plaintiff alleges that Defendants have interfered with his ability to order religious books,  
16 papers, and music. (Doc. # 8 at 14.)

17 A review of the record confirms that Plaintiff not only failed to comply with AR 810 and  
18 the Religious Practice Manual with respect to this claim, but he also failed to put Defendants  
19 on notice of it in his grievances. (*See* Doc. # 104-5 at 47-48 (Ex. H), 61-62 (Ex. L); Doc. # 122-  
20 1.) Therefore, this claim should be dismissed without prejudice.

#### 21 **j. Conduct of Senior Correctional Officer James Bauman**

22 Plaintiff alleges that Senior Correctional Officer James Bauman destroyed his religious  
23 items because of Plaintiff's religion in violation of RLUIPA, the First Amendment, and the  
24 Equal Protection Clause of the Fourteenth Amendment. (Doc. # 8 at 5, 32.)

25 Preliminarily, as set forth above, the NDOC Religious Practice Manual categorizes  
26 inmate requests under AR 810 into five (5) categories, none of which govern the claims made  
27 with respect to Senior Correctional Officer Bauman. (*See* Doc. # 104 Ex. C at 14.)

1       Next, Defendants are correct that the only grievance relevant to this claim is grievance  
2 number 2006-27-86530. (*See* Doc. # 104 at 19; Doc. # 122-1 at 21-63.) Defendants are also  
3 correct that Plaintiff did not mention Senior Correctional Officer Bauman in his informal level  
4 grievance or property claim form in connection with this grievance. (*See* Doc. # 104 at 19-20;  
5 Doc. # 122-1 at 21-51.) Defendants do concede that Plaintiff mentioned Senior Correctional  
6 Officer Bauman in the first level grievance (*see* Doc. # 104 at 21; *see also* Doc. # 122-1 at 54,  
7 56); however, Defendants maintain Plaintiff did not provide sufficient notice of the claim  
8 against Senior Correctional Officer Bauman. (Doc. # 104 at 20-21.) Specifically, Defendants  
9 argue because Plaintiff did not reference Senior Correctional Officer Bauman in the informal  
10 level grievance, and only made passing reference to him in the first level grievance, he did not  
11 comply with NDOC grievance procedures which require that he provide all factual information  
12 at the informal level. (*See id.* at 19-21.)

13       The United States Supreme Court has held that “exhaustion is not *per se* inadequate  
14 simply because an individual later sued was not named in the grievances.” *Jones v. Bock*, 549  
15 U.S. 199, 219 (2007).<sup>12</sup> Rather, to the extent any such requirement may exist, it must come from  
16 prison regulations prescribing the grievance process for that prison. *See id.* In ruling this way,  
17 the Supreme Court relied on a Fifth Circuit decision, quoting the following language: “We are  
18 mindful that the primary purpose of a grievance is to alert prison officials to a problem, not to  
19 provide personal notice to a particular official that he may be sued; the grievance is not a  
20 summons and complaint that initiates adversarial litigation.” *Id.* (quoting *Johnson v. Johnson*,  
21 385 F.3d 503, 522 (5th Cir. 2004)).

22       Keeping in mind that the primary purpose of the grievance is to put the prison on notice  
23 of the *problem*, and not to identify each and every individual *defendant* that will later be sued,  
24 the court finds that Plaintiff properly grieved this claim. The requirement to exhaust  
25 administrative remedies is put in place to afford the prison an opportunity to address the  
26

---

27       <sup>12</sup> Defendants acknowledge this ruling by the Supreme Court. (*See* Doc. # 104 at 19.)  
28

inmate complaint internally, and it appears in this case that Plaintiff's grievance allowed the prison to do so. Plaintiff sufficiently put the prison on notice of the problem, and was not required to list every person that would later become a defendant to satisfy NDOC's exhaustion requirements. The court notes that it finds Defendants' argument particularly unconvincing because it is likely the inmate may not have access to records identifying officers on duty during a particular time frame at the time he is filing his grievance. Accordingly, Defendants' motion should be denied with respect to this claim.

#### **IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

As indicated above, Plaintiff titles his response to Defendants' Motion to Dismiss, "Opposition to Defendants' Motion to Dismiss and Motion for Summary Judgment," which was docketed as Plaintiff's Opposition to Defendants' Motion to Dismiss (Doc. # 110) and Plaintiff's Motion for Summary Judgment (Doc. # 111). The court previously stayed the briefing schedule on Plaintiff's Motion for Summary Judgment for thirty (30) days following the District Court's adoption or denial of this Report and Recommendation. (See Doc. # 119.) Upon further review of Plaintiff's Motion for Summary Judgment, the court hereby lifts the stay, and recommends denial of Plaintiff's Motion for Summary Judgment (Doc. # 111).

Federal Rule of Civil Procedure 56 governs motions for summary judgment. Fed. R. Civ. P. 56. Summary judgment is only appropriate if the moving party establishes "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact.

*Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Moreover, under Local Rule 56-1, the moving party must cite "*the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.*" LR 56-1 (emphasis added). Plaintiff does not refer to a single shred of evidence to support his motion.

(See Doc. # 111.) Instead, he merely states in a conclusory fashion that Defendants have no evidence to prove him wrong. (*Id.* at 5-9.) Having failed to establish there is no genuine dispute as to any material fact, Plaintiff's motion (Doc. # 111) should be denied.

#### **V. RECOMMENDATION**

**IT IS HEREBY RECOMMENDED** that the District Judge enter an Order **DENYING** Plaintiff's Motion for Summary Judgment (Doc. # 111).

**IT IS HEREBY FURTHER RECOMMENDED** that the District Judge enter an Order **GRANTING IN PART AND DENYING IN PART** Defendants' Motion to Dismiss (Doc. # 104) as follows:

Defendants' Motion to Dismiss (Doc. # 104) should be **GRANTED** and the following claims should be **DISMISSED WITHOUT PREJUDICE**:

(1) Plaintiff's claim that he is precluded from participating in numerous Native American ceremonies (Doc. # 8 at 6);

(2) Plaintiff's claim that his ability to pray was inhibited (Doc. # 8 at 7, 14, 25);

(3) Plaintiff's claim regarding the preparation and adequacy of food for ceremonial meals (Doc. # 8 at 10-11, 13-14);

(4) Plaintiff's claim that he was denied the ability to wear religious headgear in the culinary, yard, or living units (Doc. # 8 at 10);

(5) Plaintiff's claim that he was denied the ability to burn herbs in his living area (Doc. # 8 at 11, 13);

(6) Plaintiff's claims that the use of religious land is subject to Defendants' arbitrary schedule, and that he is precluded from using a separate plot of ground for solitary practice of his religion (Doc. # 8 at 12, 20); and

(7) Plaintiff's claim that Defendants interfered with his ability to order religious books, papers, and music (Doc. # 8 at 14).

Defendants' Motion to Dismiss (Doc. # 104) should be **DENIED** with respect to the following:

1 (1) Plaintiff's claim that he was precluded from possessing certain religious items (Doc.  
2 # 8 at 6-7, 10-11, 13-15, 26);

3 (2) Plaintiff's claim that he was discriminated against based on his religion (Doc. # 8 at  
4 7, 15, 24, 32); and

5 (3) Plaintiff's claims concerning the conduct of Senior Correctional Officer James  
6 Bauman (Doc. # 8 at 5, 24, 32).

7 The parties should be aware of the following:

8 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the  
9 Local Rules of Practice, specific written objections to this Report and Recommendation within  
10 fourteen (14) days of receipt. These objections should be titled "Objections to Magistrate  
11 Judge's Report and Recommendation" and should be accompanied by points and authorities  
12 for consideration by the District Court.

13 2. That this Report and Recommendation is not an appealable order and that any  
14 notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the  
15 District Court's judgment.

16 DATED: November 30, 2011.

17  
18   
19 \_\_\_\_\_  
20 UNITED STATES MAGISTRATE JUDGE  
21  
22  
23  
24  
25  
26  
27  
28